NO. 83728-7

SUPREME COURT
OF THE STATE OF WASHINGTON

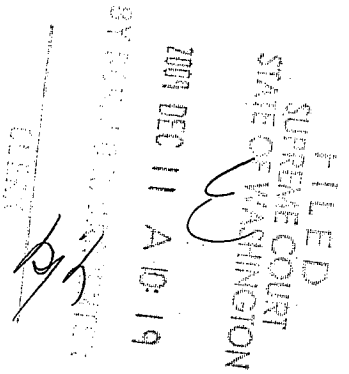
KATHLEEN HARDEE,

Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF EARLY LEARNING,

Respondent.



AMICUS CURIAE MEMORANDUM
IN SUPPORT OF PETITION FOR REVIEW
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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I. IDENTITY OF AMICUS CURIAE

The Northwest Justice Project (NJP) is a statewide organization that provides free civil legal aid to low income people. As the largest civil legal aid provider in Washington, NJP serves approximately 19,000 eligible low-income people each year. One of NJP's highest case service priorities involves the representation of individuals in contested administrative proceedings, particularly with the Department of Social and Health Services (DSHS) and the Department of Early Learning (DEL). NJP is in a unique position to provide information regarding the impact the Court of Appeals' decision would have on low-income individuals who have critical interests at stake in administrative proceedings in Washington.

NJP supports the Court's review of *Kathleen Hardee v. State of Washington, Department of Social and Health Services, Department of Early Learning*, No. 62436-9-I, published at 152 Wn.App. 48, 215 P.3d 214 (2009).

II. ARGUMENT

A. Summary of Argument

Amicus represents low-income individuals statewide in administrative proceedings involving DSHS and DEL. Many involve childcare license revocation cases, similar to Ms. Hardee's, disciplinary or

licensure proceedings that adversely impact future employment opportunities. The standard of proof applied in these proceedings has varied greatly in the last eight years, due to the Court of Appeals' inconsistent application of this Court's prior rulings on the issue, and the resulting confusion at the agency level. This Court's review of the Court of Appeals' decision in this case is needed to resolve these inconsistencies and to clarify the standard of proof applicable in such cases.

B. This Court Should Accept Review Because The Court of Appeals Decision Deviates From This Court's Authority Regarding The Standard Of Proof In License Disciplinary Proceedings, And Thereby Violates Due Process.

This case concerns the standard of proof in administrative disciplinary proceedings regarding professional licenses, and its application to licensed childcare providers. Constitutional guarantees of due process apply to license revocation proceedings. *Nguyen v. Dep't of Health Medical Quality Assurance Comm'n*, 144 Wn.2d 516, 29 P.3d 689 (2001), *cert. denied* 535 U.S. 904 (2002). *See also Washington State Medical Disciplinary Board v. Johnston*, 99 Wn.2d 466, 663 P.2d 457 (1983). *Nguyen* involved the revocation of a medical license, which the Court reasoned could result in "a significant deprivation of 'liberty' or 'stigma.'" *Nguyen*, 144 Wn.2d at 528, 29 P.3d at 694 (quoting *Santosky v. Kramer*, 455 U.S. 745, 756, 102 S.Ct. 1388 (1982)). In *Ongom v. State,*

Dep't of Health, Office of Prof'l Standards, 159 Wn.2d 132, 148 P.3d 1029 (2006), this Court extended the same due process protections to certified nursing assistants.

This Court has previously held that the standard of proof required to revoke a person's medical license is clear and convincing evidence. *Nguyen,* 144 Wn.2d at 518, 29 P.3d at 689. This Court, overturning a ruling by Division I, also applied the higher standard of proof to certified nursing assistants in *Ongom*. *Ongom*, 159 Wn.2d at 137-38, 148 P.3d 1031-32.

The Court of Appeals has been inconsistent in its application of these holdings in the years following the *Nguyen* and *Ongom* decisions. Less than two months after *Nguyen*, Division I issued a decision holding that the appropriate standard of proof for revoking the license of a real estate appraiser was preponderance of the evidence, not clear and convincing evidence. *Eidson v. Dep't of Licensing*, 108 Wn. App. 712, 718-20, 32 P.3d 1039, 1044-46 (2001) Division I distinguished between the real estate appraiser in that case and the doctor in *Nguyen*, and reasoned that a higher burden of proof was warranted for the doctor because an incompetent doctor would create more of a "direct and immediate threat" to health, safety and welfare than would an incompetent appraiser. *Id.* at 719, 32 P.3d at 1045.

Division II declined to apply the *Eidson* Court's holding in *Nims v. Washington Bd. of Registration*, 113 Wn. App. 499, 53 P.3d 52 (2002), a case involving the revocation of a registered engineer's professional license. Division II found the *Eidson* Court's reasoning did not "make sense" when it came to doctors, the profession posing the greater risk, receiving the benefit of a higher standard of proof compared to a real estate appraiser. *Id.* at 505, 53 P.3d at 54.

Division III weighed in on the issue in *Kraft v. Department of Social and Health Services*, 145 Wn. App. 708, 187 P.3d 798 (2008). There, the Court held that a residential facility employee was not denied due process when the preponderance of the evidence standard of proof was applied to determine if the employee had abused a vulnerable adult. The court distinguished the case from *Nguyen* and *Ongom*, and reasoned that, unlike the petitioners in those cases, the employee "was not working in a position tied to a professional certificate." *Id.* at 716, 187 P.3d at 802.

In *Brunson v. Pierce County*, 149 Wn. App. 855, 866, 205 P.3d 963 (2009), Division II declined to extend the higher standard of proof where erotic dancers appealed the suspension of their licenses. The court reasoned that erotic dancers' licenses were not professional licenses, but rather "occupational" licenses, *Id.* at 865, 205 P.3d at 968, and did not

require any schooling or qualifying examination.[1] *Id.* at 866, 205 P.3d at 968. The court concluded that the higher standard of proof should not apply. *Id.*

In this case, Division I upheld the revocation of Ms. Hardee's child care license, and held that her license "is more in the nature of an occupational license than a professional license," likening a childcare license to the license required for erotic dancers in *Brunson*. *Hardee v. Dep't of Soc. and Health Servs., Dep't of Early Learning*, 152 Wn.App. 48, 56-57, 215 P.3d 214, 218 (2009). The Court concluded that Ms. Hardee was not entitled to the clear and convincing standard of proof. *Id.* The Court reasoned that unlike a professional license, Ms. Hardee's license was a "site license". *Id.* at 56. However, the child care license requires completion of 20 hours of training, far exceeding what is required for an erotic dancer.[2] To equate the two types of licenses is incongruous, at best.

In essence, the Division I Court concluded that a childcare provider is not entitled to the same due process protections in retaining her license that would be extended to a physician, engineer, or a nursing assistant. In *Ongom*, however, this Court concluded that Ms. Ongom had

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[1] The Court also determined that the suspensions of the Appellants' licenses were not quasi-criminal in nature. *Brunson* at 864-65, 205 P.3d at 968.
[2] WAC 170-296-0160.

both a property interest and a liberty interest in her nursing assistant registration. Further, the *Ongom* Court considered the potential damage to Ms. Ongom's professional reputation that would result from the loss of her license, reasoning it would be just as significant to her future employment opportunities as would the loss of a medical license to a physician. Implicit in the Division I opinion in this case is the analysis it applied in *Eidson*, as the Court appears to be deciding the applicable standard of proof on a profession-by-profession, case-by-case basis. Under the *Eidson* analysis, an incompetent nurse's assistant would create more of a "direct and immediate threat" to health, safety and welfare than would an incompetent licensed childcare provider, and so the incompetent nurse's assistant would require a higher standard of proof than a child care provider. The result is absurd and devalues the work of child care providers. Someone who is tasked with caring for children is inherently responsible for their health, safety, and welfare.[3] The direct impact that a childcare provider has on the children in his or her care is equal to, if not greater than, the impact that a nurse's assistant has on the people in his or her care.

The second prong to the *Eidson* analysis requires that the Court consider the amount of time and money invested in obtaining a license. A

[3] WAC 170-296-1260.

license is optional for nursing assistants,[4] whereas a childcare license is mandatory. WAC 170-296-0140. Childcare providers must receive training and credentialing as part of their licensing requirements.[5] There is an extensive process to obtain a childcare license including an inspection, compliance with local codes and ordinances and renewal every three years.[6] Additionally, DEL emphasizes the importance of the role of childcare providers, by referring to them as "professionals" at several places on its website,[7] and by encouraging continued education.[8]

The third prong of the *Eidson* analysis requires the Court to consider whether the charges alleged are subjective or objective in nature. When comparing *Ongom* to Ms. Hardee's case, it appears that the allegations in both cases are subjective in nature (one involves the alleged abuse of a patient, and the other the allegation that a child was left unsupervised by the childcare provider). Even under the arbitrary

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[4] WAC 246-841-400.
[5] WAC 170-296-0140; WAC 170-296-1410.
[6] WAC 170-296-0125; 170-296-0160; 170-296-0260.
[7] See "Washington Scholarships for Child Care Professionals," http://www.del.wa.gov/partnerships/development/scholarships.aspx "Other Early Learning Professional Development Activities," http://www.del.wa.gov/partnerships/development/activities.aspx "Building Bridges with Higher Education," http://www.del.wa.gov/partnerships/development/bridges.aspx "Professional Development Consortium," http://www.del.wa.gov/partnerships/development/consortium.aspx
[8] http://www.del.wa.gov/publications/licensing/docs/ProviderHandbook.pdf

Division I *Eidson* analysis, Ms. Hardee should have been entitled to the clear and convincing standard at her hearing.

It is interesting to note that in the *Ongom* decision, which this Court reversed, the Court of Appeals reiterated the *Eidson* "case-by-case" analysis. *Ongom v. Dep't of Health, Office of Prof'l Standards*, 124 Wn. App. 935, 940-48,104 P.3d 29, 31-37 (2005). Under that analysis, Division I held that a nursing assistant did not a have property or a liberty interest in her license. *Id.* at 941-46, 104 P.3d at 32-35.

The standard of proof that is applied in professional disciplinary proceedings has been inconsistent in the last eight years, due to the Court of Appeals' incongruent application of this Court's rulings in *Nguyen* and *Ongom*. In the present case, the Court of Appeals' ruling regarding the applicable standard of proof has resulted in a violation of Ms. Hardee's due process rights. If it stands, it will continue the confusion that exists with the applicable standard of proof.

C. Review Is Needed Because The Court Of Appeals Failed To Give "Due Regard" To The Administrative Review Of Findings Of Fact Made By An Administrative Law Judge Who Heard The Case And Saw The Witnesses.

Washington's Administrative Procedure Act requires a reviewing judge to give great weight to the Findings of Fact of an Administrative

Law Judge (ALJ), the person who hears the testimony, takes evidence first hand, and renders a decision. RCW 34.05.464(4) provides in part:

> The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing... In reviewing findings of fact by presiding officers, ***the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses.***

(Emphasis added). Additionally, the Washington Administrative Code requires a DEL review judge to consider the ALJ's opportunity to observe the witnesses. WAC 170-03-0620(1).

This Court has noted "the particular solicitude of RCW 34.05.464(4) for the credibility findings of the hearing officer". *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 405 n.3, 858 P.2d 494, 499 n.3 (1993) although the issue was not before the Court at that time. The solicitude of RCW 34.05.464(4) "due regard" is now before this Court.[9]

The substantial evidence standard is intended to accord "due deference to the factual determinations of the actual finder of fact." *State v. Hill*, 123 Wn. 2d 641, 646,870 P.2d 313 (1994). Such deference to the initial fact finder is vital to a fair system of adjudication. *Id.* However, the Court of Appeals in this case held that the mere application of the substantial evidence test suffices to uphold findings of fact made by a

[9] See *Tapper* at 405 n.3, 858 P.2d 494, 499 n.3.

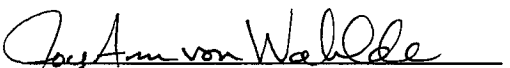
review judge upon a cold record that overturns findings made by the ALJ who heard, saw, and determined the credibility of the evidence presented. The legislature intended that "due regard" be accorded and mandated the written expression of that due regard by requiring the review judge to explain the reasons and basis when departing from an ALJ's findings.[10]

In addition, due process requires that the review judge fully explain on the record the reasons and basis for diverging from an ALJ's findings.[11] Review of this case is needed to impart meaningfulness to the due regard standard—something the Court of Appeals failed to do.

III. CONCLUSION

For all of the stated reasons, this Court should grant the Petition for Review filed by Ms. Hardee.

Respectfully submitted,



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On behalf of the Northwest Justice Project
Amicus Curiae

[10] RCW 34.05.461(3); RCW 34.05.464(8). Contrary to these statutes, Division I held in *Northwest Steelhead and Salmon Council of Trout Unlimited v. Washington State Dep't of Fisheries*, 78 Wn. App. 778, 896 P.2d 1292 (1995), that reviewing agencies are not obligated to explain their basis for rewriting findings of fact. *Id.* at 785-86.

[11] *See*, e.g., *Peak v. Pa. Commonwealth, Unemployment Comp. Bd. of Review*, 509 Pa. 267, 278, 501 A.2d 1383 (1985); *Moore v. Ross*, 687 F.2d 604, 610 (2nd Cir. 1982).

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I, Bridgette C. Murphy, certify as follows: That I am a citizen of the United States, resident of the state of Washington, over the age of 18 years, and not a party to or interested in the above action.

On November 30, 2009, I arranged to have served, true and correct copies of:

> MOTION OF NORTHWEST JUSTICE PROJECT FOR LEAVE TO FILE AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW TO THE SUPREME COURT OF THE STATE OF WASHINGTON

and

> AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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Dated this 30th day of November, 2009.

By: Bridgette C. Murphy
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